86-79

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court of The United States
OCTOBER TERM, 1986

PINE STREET BAPTIST CHURCH, *et al.*, *Petitioners*,
vs.
SECURITIES INVESTOR PROTECTION CORPORATION
and FRED D. BRYAN, TRUSTEE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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58 pp

QUESTION PRESENTED

Does a United States District Court have jurisdiction and discretionary authority to require the Securities Investor Protection Corporation (SIPC) to pay prejudgment and post-judgment interest to customers of broker-dealers liquidated under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa to 78lll (1982), whose claims remained unpaid for seven and one-half years due to SIPC's protracted, unsuccessful litigation contesting their claims?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners, Pine Street Baptist Church, First Church of the Nazarene, Randall Memorial Free Will Baptist Church, Fairwinds Baptist Church, Southmoor Baptist Church, Westwood Baptist Church, West Gate Baptist Church, First Church of God, Christian Schools, Inc. d/b/a Good Pasture Christian Schools, and Theatre Nashville and the respondents, Securities Investor Protection Corporation and Fred D. Bryan, Trustee. The petitioners have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 23, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 788 F.2d 1208 (1986), is reprinted in Appendix A to this Petition. The Memorandum and Order of the District Court awarding interest is unreported and appears in Appendix B. The District Court's Memorandum and Order calculating the award of interest is unreported and appears in Appendix C.

The District Court's original decision that petitioner Pine Street Baptist Church qualified as a "customer" under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*, is reported at 446 F. Supp. 844 (M.D. Tenn. 1977). The Court of Appeals' opinion affirming the District Court's original decision is reported at 679 F.2d 608 (6th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 23, 1986, and this Petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1982).

STATUTES INVOLVED

Statutes involved in the review of the Court of Appeals' decision are 28 U.S.C. § 1961 (a)(1982) and the following sections of the Securities Investor Protection Act of 1970, as amended: 15 U.S.C. §§ 78ccc(b)(1), fff-3(a), ggg(b), kkk(c), and 111(11) (1982).[1] The verbatim text of these statutes is reprinted in Appendix D to this Petition.

STATEMENT OF THE CASE

Petitioners are customer claimants in a broker-dealer liquidation proceeding under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa to lll (1982) ("SIPA"). The jurisdiction of the District Court for the Middle District of Tennessee was originally invoked under SIPA and under 28 U.S.C. § 1331 (1982). Through SIPA, Congress created the respondent corporation, the Securities Investor Protection Corporation ("SIPC"), and established the "SIPC Fund" to provide for the orderly liquidation of failed securities brokerage firms and for the financial protection of their customers. (See Appendix A at page A2.)

On December 17, 1974, this proceeding was commenced in the United States District Court for the Middle District of Tennessee through the entry of SIPC in accordance

[1] For the sake of clarity, petitioners will cite current law, as did the Court of Appeals. The Court of Appeals stated that because the 1978 amendments to SIPA do not affect the issues in this case, it would cite to the current sections of SIPA. (See Appendix A at page A2n.1.)

with SIPA in a liquidation proceeding involving Ambassador Church Finance/Development Group, Inc. The District Court appointed respondent, Fred D. Bryan, as trustee (the "Trustee") to supervise that Company's liquidation under SIPA. After receiving notices from the Trustee in January, petitioners promptly filed customer claims with the Trustee in February 1975. In May 1975, the District Court authorized the Trustee to satisfy customer claims as expeditiously as possible and directed SIPC to advance the funds necessary to permit the Trustee to satisfy such claims. On June 2, 1975, SIPC advanced funds to satisfy the claim of at least one customer whose status SIPC did not dispute. (See Appendix A at page A3.)

After considerable delay, SIPC determined that petitioners did not qualify as "customers" under SIPA, and on that basis the Trustee rejected petitioners' claims in April 1976. Petitioners filed objections to SIPC's rejection of their claims and along with SIPC and the Trustee, litigated the customer status of Pine Street Baptist Church as a test case. (See Appendix A at page A2.) On January 9, 1981, the District Court decided that Pine Street qualified as a "customer" under SIPA. *In re Atkeison*, 446 F. Supp. 844 (M.D. Tenn. 1977). After an appeal by respondents, the Court of Appeals for the Sixth Circuit affirmed the District Court's decision on May 27, 1982. *SEC v. Ambassador Church Finance Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982).

Thereafter, additional delays resulted from SIPC's disagreement with the Trustee's contention that petitioners were entitled to interest on their payments. Finally, SIPC advanced funds to the Trustee to pay some of petitioners' net equity claims, without interest, in November 1982, and the remaining petitioners' claims in February 1983. (See Appendix A at page A3.)

Petitioners brought this action *as a part of the original liquidation proceeding* under SIPA seeking to recover prejudgment and post-judgment interest from SIPC for the seven and one-half year delay from the time SIPC advanced funds to pay the first undisputed customer claim to the time petitioners received the funds to which they were entitled. The District Court granted SIPC's motion to join the Trustee as a defendant. After a full hearing, on November 5, 1984, the District Court held that petitioners were entitled to prejudgment and post-judgment interest on their claims and ordered that SIPC pay this interest directly. (See Appendix B.) On January 9, 1985, the District Court ordered that SIPC pay interest calculated at the State of Tennessee statutory rate of six percent per annum, compounded annually, for the period from the date when SIPC advanced funds for the first customer claim to March 31, 1979, and at ten percent per annum compounded annually for the period from April 1, 1979 to the date of judgment.[2] The interest ordered to be paid to petitioners totaled $232,651.00. (See Appendix C.)

SIPC appealed to the Court of Appeals. On April 23, 1986, the Court of Appeals reversed the District Court, denied any prejudgment or post-judgment interest award, and remanded the case for entry of an order dismissing the action. (See Appendix A.)

The Court of Appeals' opinion began by summarily holding that the District Court should have dismissed the action based on this Court's decision in *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975). Without elaboration, the Court of Appeals interpreted *Barbour* as holding that SIPA does not give petitioners any cause of action against SIPC. (See Appendix A at page A5.)

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[2] Effective April 1, 1979, the allowable statutory rate of interest in Tennessee increased from six percent per annum to ten percent per annum. Tenn. Code Ann. §47-14-123 (1984).

The Court of Appeals then held that bankruptcy law applies to a liquidation proceeding under SIPA. Without recognizing exceptions in equity, the Court of Appeals ruled that because interest is not allowable against a debtor's estate absent a surplus, the District Court could not award interest to petitioners.

The decision below made no mention of the District Court's use of its discretion in awarding interest nor did the Court of Appeals recognize the distinction between prejudgment and post-judgment interest. The Court of Appeals simply found that because SIPA provides that SIPC advance funds only to pay a customer's "net equity" claim and the statutory definition of "net equity" does not include interest, SIPA does not allow SIPC to pay any interest to customers.

The Court of Appeals briefly discussed the District Court's reliance on the Ninth Circuit Court of Appeals' decision to award interest against the FDIC in *First Empire Bank v. Federal Deposit Insurance Corp.* 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978). The Court below, however, refused to apply *First Empire* to uphold the award of interest against SIPC.

In closing, the Court of Appeals further stated that 15 U.S.C. §78kkk(c) "excuses" SIPC from paying interest even though SIPC did not raise this section as a defense at trial. The Court of Appeals decided, in short, that petitioners had no cause of action for interest under SIPA, that the proceedings were in the nature of bankruptcy proceedings in which interest is not awardable, and that SIPC is immune from liability in any event under SIPA.

REASONS FOR GRANTING THE WRIT

In summary, the opinion by the Court of Appeals below ignores the fact that this claim had been properly brought under SIPA as part of the original proceeding commenced

in 1974, disregards the plain language of SIPA, which allows such a claim against SIPC, and misapplies this Court's decision in *SIPC v Barbour*. The Court of Appeals' opinion is in conflict with this Court and with other Courts of Appeals which have applied equitable principles to allow interest awards in insolvency proceedings. The decision below also conflicts with this Court and with other Courts of Appeals which recognize the trial court's discretionary power to award prejudgment interest, and is contrary to the federal statute providing for post-judgment interest. Most importantly, by insulating SIPC from customer claims both for prejudgment and post-judgment interest after SIPC has deliberately withheld funds to which the customers were entitled, the Court of Appeals gives SIPC the incentive to delay payment of such funds. This incentive will undermine the explicit purposes of SIPA to encourage confidence in the broker-dealer industry and to provide for prompt payment of customer claims. An opinion with such far-reaching adverse consequences for broker-dealer customers merits review by this Court.

I.

THE COURT OF APPEALS' INTERPRETATION OF *SIPC v. BARBOUR*, 421 U.S. 412 (1975), IS CONTRARY TO THE PLAIN MEANING AND PURPOSE OF SIPA

The Court of Appeals incorrectly construed this Court's decision in *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), as creating a complete bar to private claims directly against SIPC. (See Appendix A at page A5.) This interpretation of *Barbour* is contrary to the explicit language of SIPA and frustrates the purpose of the statute.

At the outset, *Barbour* cannot control the present case because the cases are factually and procedurally dissimilar. *Barbour* denied an implied right of action by which customers could sue *under SIPA* to "compel the SIPC to exercise its statutory authority for their benefit," and was expressly limited to this narrow ground. *Barbour*, 421 U.S. at 413-14. In the present case, petitioners' claims arise as a *part of* previously commenced proceeding under SIPA to which SIPC is a proper party and to which SIPC has never objected. Additionally, petitioners' specific claims before the Court do not involve the substance of SIPA at all: they are equitable claims that have force independent of the statute. This Court has endorsed actions for interest without statutory authorization where consistent with legislative intent and principles of equity. *See Rodgers v. United States*, 332 U.S. 371, 373 (1947); *Billings v. United States*, 232 U.S. 261, 284-88 (1914). By extending *Barbour* beyond the self-imposed limits of its holding, the Court of Appeals has created an unnecessary conflict between *Barbour* and long-standing Supreme Court precedent recognizing equitable actions for interest. Therefore, the implied right analysis presented in *Barbour* should not have been used to preclude petitioners' equitable claims for interest in this proceeding.

Even if petitioners' claims for interest could be classified as requiring a separate implied right of action under SIPA, the facts of the present case completely satisfy the criteria for granting such a right. The implied right sought in *Barbour* was not denied because of an absolute bar to such an action under SIPA, but because it failed to meet either prong of the two-part test enunciated in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1975) (hereinafter cited as *Amtrak*). Unlike the private action in *Barbour*, however, the right of action sought by petitioners satisfies

the requirements for an implied right of action both as employed in *Amtrak* and as later refined in *Cort v. Ash*, 422 U.S. 66 (1975).

In *Cort*, this Court set forth a four-part test for assessing the validity of an implied right of action:

> (1) Is the plaintiff one of the class for whose *especial* benefit the statute was enacted?
>
> (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
>
> (3) Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff?
>
> (4) Is the cause of action one traditionally relegated to state law in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort, 422 U.S. at 78.

It cannot be disputed that petitioners fall within the class of intended beneficiaries under SIPA. Their status as customers under SIPA has been judicially determined, and the stated purpose of that Act is to provide greater protection for the customer class. *See Barbour*, 421 U.S. at 413. It is obvious, therefore, that petitioners satisfy the first *Cort* criterion.

With regard to the second *Cort* element, there is also clear and convincing evidence that Congress intended to allow the type of direct claims brought by petitioners. The statute expressly authorizes SIPC to "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal." 15 U.S.C. § 78ccc(b)(1). Such a clause generally has been held to constitute both a waiver of governmental immunity and

express authorization for direct suits. *See Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512 (1984); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939).

This sue-and-be-sued clause was mentioned in *Barbour* but was not held to be controlling in light of the subsequent explicit grant of SEC authority over actions to compel SIPC intervention:

> Respondent argues that because Congress provided that the SIPC can 'sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal,' 15 U.S.C. §78ccc(b)(1), it must have contemplated occasions when an aggrieved customer of a member firm would be able to sue. *In light of the specific terms of the more relevant section governing suits to compel* the SIPC to act for the benefit of investors, that conclusion is unwarranted.

Barbour, 421 U.S. at 420, n.3 (emphasis added). Hence, *Barbour* simply resolved a conflict between competing grants of authority within SIPA; it did not judicially invalidate the entire sue-and-be-sued clause.

The Court of Appeals opinion below did not deal with the sue-and-be-sued clause at all, but apparently assumed that all direct suits against SIPC must be maintained by the SEC. (See Appendix A at page A5.) Given that SEC suits are centralized in federal court under 15 U.S.C. § 78 ggg(b), this position cannot be maintained without rendering the express authorization for state court suits against SIPC a complete nullity. Therefore, the Court of Appeals has misconstrued the sue-and-be-sued clause contained in SIPA, which is a clear indication of congressional intent to allow direct private actions against SIPC such as the claims brought by petitioners.

The third element of the *Cort* test is whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff. The claim in *Barbour* failed this test because of concern that the power to initiate SIPC intervention would be abused with disasterous consequences. *Barbour*, 421 U.S. at 422-23. In the present case, however, jurisdiction under SIPA was previously invoked, removing the issue of abuse, and petitioners only seek equitable recovery of the economic value of their recognized claims under SIPA. Customers are not protected, and therefore SIPA is frustrated, if SIPC is allowed to delay payments so unreasonably without also paying interest. Customer losses attributable to foregone interest can easily equal or surpass the amount of the original principal, as petitioners' case illustrates. Moreover, if the Court of Appeals is correct, SIPC always has a strong incentive to delay payment since it retains these proceeds. If allowed to stand, the Court of Appeals' decision will authorize SIPC to exploit this conflict of interest with impunity. Customers will eventually realize that SIPC protection has been eroded, and the congressional intent underlying SIPA will become a policy derelict.

Although Congress gave the SEC authority to supervise SIPC operations, it could not have intended this to be the sole check on actions by SIPC which adversely affect customer claims. Allowing an implied private right of action for interest in those cases where the SEC has failed to insure SIPC's prompt payment of customer claims would complement the SEC's *ex ante* supervisory role. Such private monitoring is an efficient way to guarantee fair treatment to investors, and thereby serves SIPA's stated goal of promoting confidence in broker-dealers and the securities industry.

The final *Cort* test asks whether the cause of action sought is traditionally relegated to state law, such that it

would be inappropriate to infer a cause of action based solely on federal law. SIPC is one of a number of independent corporations created by Congress to serve the public interest. These corporations are creatures of federal law and exercise their powers under federal authority. An abuse of that authority would be a matter of federal concern that lies beyond state law. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). It would not, therefore, be inappropriate to infer a private right of action under federal law. Moreover, federal law governs post-judgment interest in federal cases; 28 U.S.C. § 1961(a) (1982); and clearly can be applied to grant prejudgment interest. *See Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981).

From the foregoing analysis, it is clear that petitioners' claim is fundamentally different from that presented in the *Barbour* case. Petitioners' claims are part of a previously commenced action under SIPA, and do not depend on the substance of SIPA, but instead arise under general principles of equity. Furthermore, whereas an implied right was inconsistent with SIPA on *Barbour's* facts, petitioners' claim satisfies all the necessary criteria for such an action. The Court of Appeals decision cannot be allowed to stand without transforming the *Barbour* holding into an unjustified *per se* prohibition against any direct private claim against SIPC. Certiorari should be granted in order to preserve both the congressional intent underlying SIPA and to recognize fundamental equitable decisions rendered by this Court.

II.

THE COURT OF APPEALS' DECISION CONFLICTS WITH PRINCIPLES OF EQUITY APPLIED BY THIS COURT AND BY OTHER COURTS OF APPEALS

Whether a District Court can order SIPC to pay interest on contested customer claims is a question of first impression for this Court. The Court of Appeals' decision that a District Court has no jurisdiction or authority to do so in its sound discretion is contrary to this Court's and other Courts of Appeals' decisions in cases involving analogous circumstances. By broadly holding that SIPC cannot be required to pay either prejudgment or post-judgment interest under the provisions of SIPA, the decision below directly departs from traditional notions of equity and has the result of diminishing the protection of customers envisioned by Congress in SIPA.

The Sixth Circuit Court of Appeals differs fundamentally with rulings of this Court and other Courts of Appeals in holding that because a proceeding under SIPA is governed by bankruptcy law principles, interest is not awardable. This Court has held that in an insolvency proceeding in which funds are withheld from certain creditors while other creditors are paid, interest may be awarded to those creditors who receive late payment. *Ticonic National Bank v. Sprague*, 303 U.S. 406 (1938); *see Armstrong v. American Exchange National Bank*, 133 U.S. 433 (1890). Other Courts of Appeals have so held as well. *See First Empire Bank v. Federal Deposit Insurance Corp.*, 572 F.2d 1361 (9th Cir.) *cert. denied*, 439 U.S. 919 (1978); *Bryant v. B. & L. Farms Co.*, 343 F.2d 581 (5th Cir. 1965).

In *Ticonic*, this Court allowed interest to creditors of a liquidated national bank. After acknowledging the gen-

eral rule that in insolvency proceedings interest does not accrue on unsecured claims, this court went on to say:

> [I]nterest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors.

303 U.S. at 411.

In the decision below, the Court of Appeals refused to apply this "ideal of equality among creditors." The District Court ordered SIPC to pay petitioners out of its own assets in order "to treat claimants of like class equally." (See Appendix B at page B5.) By rejecting the District Court's equitable solution, the Court of Appeals stands in opposition to the principles applied by this Court in *Ticonic.*

Equally in conflict with the decision below is *First Empire Bank v. Federal Deposit Insurance Corp.* 572 F.2d 1361 (9th Cir.), *cert. denied,* 439 U.S. 919 (1978). In *First Empire,* the Ninth Circuit held that the creditors of a liquidated bank were entitled to interest from the Federal Deposit Insurance Corporation ("FDIC") in its receiver capacity because the FDIC did not satisfy the claims of all creditors at the same time. In the decision below, the Court of Appeals attempted to distinguish *First Empire* from petitioners' case by explaining that SIPA does not require "ratable dividends" as required by the National Banking Act and that SIPC was not the receiver, trustee or fiduciary responsible for administering the estate of the debtor broker-dealer. These distinctions, however, are irrelevant to the principles applied in *First Empire,* as the District Court correctly held.

The basis of the decision to award interest in the *First Empire* case was the ideal of equality among creditors articulated in *Ticonic.* SIPC also must treat customers

making claims under SIPA equally. Although the amount of the customer claims may vary, SIPC must advance funds to satisfy the full "net equity" claim of each customer up to the proper statutory limit. 15 U.S.C. §§ 78fff-3(a), 78lll(11). In addition, although SIPC may not be a fiduciary in liquidating broker-dealers, it is responsible under SIPA for advancing money to "promptly satisfy customer claims." 15 U.S.C. § 78fff-3(a). SIPC's duties under SIPA subject it to principles of equality among claimants analogous to those the Ninth Circuit applied in *First Empire* and which this Court applied in *Ticonic*. The decision below stands in direct conflict with such "ideals of equality" and fair treatment among claimants.

Moreover, the Court of Appeals' opinion glosses over the distinction between awarding interest on claims, which is generally not allowed in bankruptcy proceedings, and awarding interest on withheld dividends, which other circuit courts have permitted. *First Empire Bank*, 572 F.2d 1361; *Bryant v. B.&L. Farms Co.*, 343 F.2d 581 (5th Cir. 1965).

In the *Bryant* case, the Fifth Circuit Court of Appeals upheld an award of interest in a bankruptcy proceeding in which the plaintiff's claims had been withheld during two years of litigation. The court recognized the critical distinction and stated:

> It is well to observe that we are not here dealing *with interest on claims* in bankruptcy, but *interest on dividends withheld* after creditors of the same class had been paid dividends due them.

343 F.2d at 583 (emphasis in original).

In this case, petitioners are seeking interest not on prepetition claims against the debtor's estate, but on "dividends" which SIPC withheld while paying other claimants. The Court below declined to draw this distinction

and therefore is in conflict with other circuits on this issue.

The analysis in the decision below also conflicts with decisions by this Court and other circuit courts which award interest as compensation for damages (the "debt theory") or to prevent unjust enrichment. This Court held in *Billings v. United States*, 232 U.S. 261 (1914), that an award of interest is appropriate in order to compensate a party for the damage suffered by being deprived of the use of money it was properly owed. *See Miller v. Robertson*, 266 U.S. 243 (1924). The Second Circuit Court of Appeals recognized this rule in *Ruskin v. Griffis*, 269 F.2d 827 (2d Cir. 1959); and the Third Circuit applied it in *Howmet Aluminum Corp. v. Hartford Accident & Indemnity Co.*, 665 F.2d 476 (3d Cir. 1981). In contrast, the Court of Appeals refused to award interest to compensate petitioners for the damages suffered while waiting seven and one-half years for payment of funds to which they were entitled under SIPA.

Equally at odds with the decision below are holdings by this Court and by other circuit courts which award interest to prevent unjust enrichment. This Court has long recognized the principle that:

> It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when payment should have been made.

Spaulding v. Mason, 161 U.S. 375, 395 (1896). This Court held in *Crescent Mining Co. v. Wasatch Mining Co.*, 151 U.S. 317 (1894) that when a payment is adjudicated as having been due at a certain time, and the defendant has held the payment and had the benefit of the money since that time, a court may award interest to prevent unjust enrichment. The age of these cases and the lack of more

recent Supreme Court decisions on this issue demonstrate the fundamental nature of this proposition.

Many other circuit courts have awarded interest to one party to prevent the unjust enrichment of another who had the benefit of money belonging to the first party. *See e.g., United States v. Dollar Rent-A-Car Systems, Inc.*, 712 F.2d 938 (4th Cir. 1983) (interest may be awarded on a federal contract claim on monies that were withheld); *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (the doctrine of unjust enrichment calls for an award of interest greater than the statutory rate); *Davis Cattle Co. v. Great Western Sugar Co.*, 544 F.2d 436 (10th Cir. 1976), *cert. denied* 429 U.S. 1094 (1977) (interest may be awarded to the plaintiff equal to the interest defendant must pay for its borrowed funds). In the *Peterson* case the Third Circuit best explained the reasons for applying equitable principles to prevent unjust enrichment:

> Mindful of 'those considerations of basic fairness and equity which suggest a more flexible rule..., [and] not unmindful of the fact that at the currently high money-market rates [a contrary] ruling appears to create a built-in incentive to withhold sums due, and indeed, to prolong litigation'...we will remand the case for redetermination by the district court of the damages for delay, which may be set at a rate greater than Pennsylvania's legal rate of interest.

661 F.2d at 298 (citation omitted).

The Court of Appeals below did not address the fact that SIPC earned more interest on the funds withheld from the petitioners for seven and one-half years than the amount of interest the District Court ordered SIPC to pay petitioners. The decision below implicitly rejects the unjust enrichment doctrine and thus, is contrary to equitable awards of interest made by this Court and by other circuit courts to prevent unjust enrichment.

III.
THE COURT OF APPEALS' DECISION IS CONTRARY TO THE PURPOSE AND INTENT OF SIPA

In its opinion below, the Court of Appeals interpreted 15 U.S.C. § 78kkk(d) to provide immunity for SIPC to suit for actions taken in good faith. (See Appendix A at page A6.) The effect of this provision on petitioner's claim should not have been considered on appeal, however, because it constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, which was waived when SIPC failed to raise it at trial. *See Senter v. General Motors Corp.*, 532 F.2d 511, 530 (6th Cir. *cert. denied*, 429 U.S. 870 (1976); *Roe v. Sears, Roebuck & Co.*, 132 F.2d 829 (7th Cir. 1943); 8A Moore ¶ 8.27 [3] at 1853 (2d Ed. 1984); Wright & Miller, *Federal Practice and Procedure*: Civil §1278 (1969). Because this defense was waived, no evidence was introduced or considered on the issue of SIPC's good faith — an omission that led the Court of Appeals to assume that no bad faith was alleged. (See Appendix A at page A10.) At the very least, if bad faith were an issue, the case should have been remanded to the District Court for discovery and argument on the issue of SIPC's good faith. Therefore, the Court of Appeals erred both in considering a waived defense and in rendering a underlying *de novo* factual adjudication based on an incomplete record.

In any event, the Court of Appeals erred substantively in its application of 15 U.S.C. § 78kkk(d) to petitioners' action. The legislative history to this section makes clear that it can only be raised as a defense to tort actions. The House Report reads:

> [this section] provides that neither SIPC nor its directors shall have liability for actions taken or omitted in good faith under or in connection with matters contemplated by the legislation. This

> primarily intended to insure that SIPC or its directors are not subjected to tort liability for their actions in the course of SIPC's operations so long as they are acting in good faith. *This, of course, is not intended to relieve SIPC from liability for its contractual obligations.*

H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5254, 5278 (emphasis added). Petitioner's action is not in tort, but is based instead on a theory of damages from withheld funds, which is contractual, or unjust enrichment, which is quasi-contractural in nature. *See Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Herrmann v. Gleason*, 126 F.2d 936 (6th Cir. 1942); *Paschall's Inc. v. J.P. Dozier*, 219 Tenn. 45, 49, 407 S.W. 2d 150, 154 (1966). Hence, the statutory immunity from tort liability provided in 15 U.S.C. § 78kkk(d) is wholly inapplicable to petitioners' claims. This Court should grant this petition to correct the Court of Appeals' error in this important regard.

IV.
THE COURT OF APPEALS' INTERPRETATION OF SIPA CONFLICTS WITH THIS COURT'S AND OTHER COURTS OF APPEALS' RECOGNITION OF JUDICIAL DISCRETION IN AWARDING INTEREST AND IS CONTRARY TO FEDERAL STATUTE

The decision below did not state that the District Court abused its discretion in ordering SIPC to pay interest to petitioners. The Court of Appeals also did not distinguish between the standards for awarding prejudgment interest and awarding post-judgment interest. These two omissions in the Court of Appeals' analysis clearly set its decision at odds with this Court, with other circuit courts and with a federal statute.

The general rule, in cases arising under federal law, is that absent a statutory provision, the award of prejudgment interest rests in the sound discretion of the trial court. *See, e.g., Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984); *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239 (8th Cir. 1981); *United States v. California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982); This Court recognized the general rule in *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941), by stating that "in the absence of any controlling statutory regulation, the trial court is as competent to determine the amount of interest for delay as any other item of damage."

313 U.S. at 296 (citations omitted).

The Court of Appeals below held that because SIPA only authorizes SIPC to advance money to the trustee to satisfy a customer's "net equity" claim and because the definition of "net equity" does not provide for interest, SIPA prohibits a court from balancing the equities and ordering SIPC to pay interest. This Court and other circuit courts specifically allow a district court to award interest where a statute, such as SIPA, is silent on the issue of interest payments. *See, e.g., Billings v. United States*, 232 U.S. 261 (1914); *Rodgers v. United States*, 332 U.S. 371 (1947); *Zerman v. Jacobs*, 751 F.2d 82 (2d Cir. 1984). By implying a prohibition on interest awards where Congress has not addressed the subject, the Court of Appeals' opinion stands in conflict with the general rule applied by this Court and by many other circuit courts. Further, this "net equity" limitation on interest conflicts in principle with the ruling of the Third Circuit Court of Appeals in *Howmet Aluminum Corp. v. Hartford Accident & Indemnity Co.*, 665 F.2d 476 (3d Cir. 1981), in which the

court awarded interest resulting in total claims exceeding insurance policy limits.

In addition, by failing to distinquish between prejudgment and post-judgment interest, the Court of Appeals ignored 28 U.S.C. §1961(a) (1982). This provision states explicitly that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." SIPC delayed for several months before paying petitioners after final judgment in the controlling Pine Street test case. The Court of Appeals' failure to award even post-judgment interest is directly contrary to this federal statute and to other cases too numerous to cite.

CONCLUSION

Taken as a whole, the decision below gives SIPC total immunity from customer claims for either prejudgment or post-judgment interest and thus, encourages SIPC to delay paying customer claims. This result undermines the clear purpose of SIPA. Moreover, the analysis applied by the Court of Appeals in reaching this result conflicts with equitable principles applied by this Court and other circuit courts. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

NOS. 85-5132 & 85-5133
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECURITIES INVESTOR PROTECTION CORPORATION, *Plaintiff*,	)	
V.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., *Defendant*,	)	
SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
V.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., *et al.*, *Defendants*,	)	
PINE STREET BAPTIST CHURCH, *et al.*, *Claimants-Appellees*,	)	
V.	)	
SECURITIES INVESTOR PROTECTION CORPORATION, *Defendant-Appellant*, FRED D. BRYAN, *Trustee-Appellee.*	)	

Decided and Filed April 23, 1986

Before: KENNEDY and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

CORNELIA G. KENNEDY, Circuit Judge.

This case arises out of the liquidation of Ambassador Church Finance/Development Group, Inc. ("Ambassador") under the Securities Investor Protection Act of 1970 ("SIPA"), as amended, 15 U.S.C. §§ 78aaa-78lll.[1] The SIPA created defendant-appellant, Securities Investor Protection Corporation ("SIPC"), and established the "SIPC Fund" to provide for the orderly liquidation of failed securities brokerage firms and for the financial protection of their customers. Under the SIPA, the SIPC maintains the SIPC Fund by levying assessments on almost all brokerage firms. When necessary, the SIPC satisfies the claims of the "customers" of a bankrupt broker-dealer for cash or securities out of the SIPC Fund.[2]

Acting upon the application of the Securities and Exchange Commission ("SEC"), the United States District Court for the Middle District of Tennessee appointed trustee-appellee, Fred D. Bryan ("the trustee"), as temporary receiver of Ambassador on November 7, 1974. On December 17, 1974, the District Court found that Ambassador's customers needed the protections of the SIPA and appointed Bryan as trustee to supervise Ambassador's liquidation. In January 1975, the trustee sent a notice to Ambassador's customers, including plaintiffs-appellees, instructing the customers to file their claims with the trustee. Plaintiffs-appellees promptly filed their claims.

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[1] In the Securities Investor Protection Act Amendments of 1978, Pub.L.No. 95-283, 92 Stat. 249, Congress extensively amended the SIPA. Since these amendments do not affect the issues in this case, we cite current law.

[2] At the time of this liquidation, the SIPA provided that the SIPC shall advance funds from the SIPC Fund to the trustee to satisfy customers' claims up to $50,000. The SIPC, however, would only satisfy customers' outstanding cash balances to the extent of $20,000 per customer. Today, the SIPC Fund protects customers' cash balances to $100,000 and total cash and securities to $500,000. 15 U.S.C. § 78fff-3(a)(1).

In April 1975, the trustee asked the SIPC to determine whether plaintiffs-appellees and other similarly situated claimants qualified as "customers" under 15 U.S.C. § 78lll (2). On May 7, 1975, the District Court entered an order authorizing and directing the SIPC to advance, from time to time, to the trustee sufficient funds to permit the trustee to satisfy the claims that customers had filed against the estate. On June 2, 1975, the SIPC advanced funds to the trustee to satisfy the claim of another customer which the SIPC did not dispute.

In April 1976, after considerable delay, the SIPC determined that plaintiffs-appellees did not qualify as "customers" under the SIPA. Plaintiffs-appellees filed objections to the SIPC rejection of their claims and asserted entitlement to "customer" status. The SIPC, the trustee and plaintiffs-appellees proceeded to litigate the claim of Pine Street Baptist Church ("Pine Street") as a "test case" on the issue whether plaintiffs-appellees qualified as "customers." On January 9, 1981, the District Court entered an order declaring that Pine Street qualified as a "customer" under the SIPA and was entitled to the full amount of its claim. *In re Atkeison*, 446 F.Supp. 844 (M.D. Tenn. 1977). SIPC and the trustee appealed. On May 27, 1982, this Court affirmed the District Court's decision. *Securities and Exchange Commission v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982). When the trustee and the SIPC could not agree whether plaintiffs-appellees were entitled to interest during the previous proceedings, an additional delay occurred before the SIPC paid plaintiffs-appellees' "customer" claims. Finally, in November 1982, the SIPC advanced funds to the trustee to satisfy some of plaintiffs-appellees' claims. In February 1983, the SIPC advanced more funds to pay the remaining claims.

Plaintiffs-appellees brought this action directly against the SIPC to recover interest on their claims for the seven and one-half year period that the SIPC had delayed in paying their claims. The SIPC filed a motion to join trustee-appellee as a defendant. The District Court granted the motion. On November 5, 1984, the District Court, following a short trial, held that plaintiffs-appellees could recover interest directly from the SIPC. The District Court's order gave plaintiffs-appellees ten days to submit calculations showing the amount of interest due. On January 9, 1985, the District Court ordered the SIPC to pay the following amounts of interest directly to plaintiffs-appellees by January 31, 1985:

Pine Street Baptist Church	$12,515.61
First Church of the Nazarene	11,375.80
First Church of God	10,201.40
Theatre Nashville, Inc.	10,201.40
First Missionary Baptist Church	18,891.50
West Gate Baptist Church	48,136.24
Randall Memorial Free Will Baptist Church	48,594.40
Southmoor Baptist Church	14,690.07
Fairwinds Baptist Church	14,335.35
Westwood Baptist Church	35,107.25
Christian Schools, Inc.	8,602.17

The District Court awarded six percent per annum interest compounded annually for the period from June 2, 1975, the date when the SIPC first advanced money to the trustee to pay a "customer" claim that the SIPC did not contest, to March 31, 1979. The District Court awarded ten percent annual interest compounded annually for the period from April 1, 1979 to the date of judgment. The SIPC objected to any compounding of interest.

The SIPC raises three issues on appeal: (1) Whether the District Court erred in awarding interest to plaintiffs-appellees for the seven and one-half year period that the SIPC withheld funds from plaintiffs-appellees' claims as

"customers" under the SIPA; (2) Whether the District Court could award "compound interest;" and (3) Whether the District Court should have subrogated the SIPC to the rights of plaintiffs-appellees to the extent of any interest payments that the SIPC makes to plaintiffs-appellees.[3] For the reasons stated below, we hold that the District Court erred in awarding interest to plaintiffs-appellees. In light of this disposition, we do not consider the second and third issues.

Initially, we note that the District Court should have dismissed the action because plaintiffs-appellees, as customers, could not bring an action directly against the SIPC. In *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975), the Supreme Court held that the SIPA does not give customers of failing broker-dealers an implied private cause of action to compel the SIPC to take action under the SIPA. In this case, plaintiffs-appellees brought suit against the SIPC. Consequently, the District Court should have dismissed the action because the SIPA does not give plaintiffs-appellees a cause of action against the SIPC.

In addition, the SIPC argues that since liquidation under the SIPA parallels a bankruptcy proceeding, the District Court could award interest against Ambassador's estate only if the estate's assets were sufficient to satisfy the principal amount of all valid claims against the estate. Essentially, a liquidation under the SIPA is a bankruptcy proceeding. Title 15 U.S.C. 78fff(b) provides:

> To the extent consistent with the provisions of this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of

[3] Trustee-appellee, Fred D. Bryan, argues on behalf of the estate's creditors that the District Court properly refused to subrogate SIPC to plaintiffs-appellees' rights to the extent of any interest payments that the SIPC makes to plaintiffs-appellees.

> chapter 7 of Title 11. For the purposes of applying such title in carrying out this section, a reference in such title to the date of filing of the petition shall be deemed to be a reference to the filing date under this chapter.

Under the bankruptcy law, with certain exceptions not applicable in this case, a court cannot award post-petition interest against the debtor's estate unless a surplus exists.[4] In *Nicholas v. United States*, 384 U.S. 678, 86 S.Ct. 1674, 16 L.Ed.2d 853 (1966), the Supreme Court stated: "It is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed." *Id.* at 682, 86 S.Ct. at 1678 (citation omitted). In *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163, 67 S.Ct. 237, 240, 91 L.Ed. 162 (1946), the Supreme Court explained the reason for the rule:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment — a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved.

Furthermore, the rule reflects "the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws." *Nicholas v. United States*, *supra* at 683, 86 S.Ct. at 1679 (footnote omitted). The SIPC

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[4] Only three exceptions exist to the general rule against post-petition interest on claims against a bankrupt debtor. First, courts allow interest where the allegedly bankrupt debtor ultimately proves solvent. Second, courts allow interest to secured creditors when the secured property generates income. Third, courts have awarded interest on secured claims when the value of the security exceeds both the principal and interest due. *In re Caudle*, 13 B.R. 29, 33 (Bankr.W.D. Tenn. 1981).

reasons that since the debtor's estate is insolvent, the District Court could not award interest on plaintiffs-appellees' claims. We agree.

Furthermore, 15 U.S.C. § 78fff-3 provides the exclusive authority for the SIPC to advance funds to a trustee in a liquidation proceeding.[5] Although 15 U.S.C. § 78fff-3(b)

[5] Title 15 U.S.C. § 78fff-3 provides:

(a) Advances for customers' claims. — In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys, not to exceed $500,000 for each customer, as may be required to pay or otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that —

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;

(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity,

gives the SIPC authority to advance administrative expenses to the trustee and § 78fff-3(c) allows the SIPC to make certain discretionary advances, § 78fff-3(a) governs the SIPC's advances to the trustee to satisfy the "net equity claims of customers of the debtor." Title 15 U.S.C. § 78lll (11) defines "net equity" as:

> the dollar amount of the account or accounts of a customer, to be determined by —
>
> (A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus
>
> (B) any indebtedness of such customer to the debtor on the filing date; plus
>
> (C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than

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SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

(b) Other advances. — SIPC shall advance to the trustee —

(1) such moneys as may be required to carry out section 78fff-2(e) of this title; and

(2) to the extent the general estate of the debtor is not sufficient to pay any and all costs and expenses of administration of the estate of the debtor and of the liquidation proceeding, the amount of such costs and expenses.

(c) Discretionary advances. — SIPC may advance to the trustee such moneys as may be required to —

(1) pay or guarantee indebtedness of the debtor to a bank, lender, or other person under section 78fff-1(b)(2) of this title;

(2) guarantee or secure any indemnity under section 78fff-2(f) of this title; and

(3) purchase securities under section 78fff-2(d) of this title.

> sixty days after the publication of notice under section 78fff-2(a) of this title).
>
> In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

Since the definition of "net equity" does not include interest, we hold that the SIPA does not authorize the SIPC to pay interest, either to the trustee or directly to the debtor's customers. As the District Court noted in its opinion, "Congress could have specifically provided for payment of interest out of the funds of SIPC, but did not do so."

The District Court, however, relied on *First Empire Bank-New York v. Federal Deposit Insurance Corporation*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), when ordering the SIPC to pay interest directly to plaintiffs-appellees. In *First Empire*, the Ninth Circuit allowed the appellants to recover the interest accruing on each letter of credit from the date the letter of credit matured, the dates on which the FDIC would have made a ratable distribution if the FDIC had treated all the claims against the debtor bank ratably. The court recognized that the purpose of the general rule disallowing interest accruing after insolvency is to further the concept of ratable distribution. The court, however, concluded that the general rule did not apply because the FDIC had failed to make the "ratable dividend" that 12 U.S.C. § 194 required.

> [A] difference must be recognized between the case where interest accruing after insolvency is added to become a part of the claim itself and the case where interest is awarded in addition to the amount of the claim for failure of the receiver to pay the claim when it became due or to include the claim in a distribution in which it was entitled ratably to share.

Id. at 1372. The Ninth Circuit observed that in *Ticonic National Bank v. Sprague*, 303 U.S. 406, 411, 58 S.Ct. 612, 614, 82 L.Ed. 926 (1938) (citation omitted), the Supreme Court stated:

> It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. *But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors.*

572 F.2d at 1372 (emphasis added by Ninth Circuit).

First Empire, however, does not apply to this case for two reasons. Initially, in *First Empire*, the FDIC, as receiver of the bankrupt bank, distributed virtually all of the debtor's assets to some creditors, while depriving other creditors their ratable share of the estate. In this case, the SIPC was not a trustee, receiver, or other fiduciary responsible for the liquidation of Ambassador's estate. Second, *First Empire* involved the National Bank Act, 12 U.S.C. § 194, which requires "ratable dividends." The SIPA, however, does not mention ratable dividends, distributions, or advances. Since the SIPA only protects customers' accounts to a maximum of $500,000 for total cash and securities but only $100,000 for cash, the SIPC often makes nonratable distributions from the SIPC Fund. Accordingly, we refuse to apply *First Empire* in the context of the SIPA in this case.

Finally, we note that 15 U.S.C. § 78kkk(c) provides that "[n]either SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter." Plaintiffs-appellees have not asserted any bad faith on the part of the SIPC in contesting their claims to "cus-

tomer" status. Consequently, 15 U.S.C. § 78kkk(c) excuses the SIPC from any obligation to pay interest under the circumstances of this case.

Accordingly, the District Court order awarding interest to plaintiffs-appellees is reversed. The case is remanded to the District Court for entry of an order dismissing the action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
	)	
v.	)	
	)	
AMBASSADOR CHURCH FINANCE DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
	)	
v.	)	
	)	No. 74-471
AMBASSADOR CHURCH FINANCE DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 3-83-0541
PINE STREET BAPTIST CHURCH, *et al.*	)	
	)	
v.	)	
	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

MEMORANDUM

After seven years of litigation, the plaintiffs won payment of their claims under the Securities Investor Protection Act (the Act). Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (1970) (current version at 15 U.S.C. §§ 78aaa *et seq.* (1978)). They now seek to recover interest on those claims directly from the Securities Investor Protection Corporation (SIPC). Whether they are entitled to do so appears to be an issue of first impression. In this court's opinion, they are.

The facts of this case are set forth fully in a prior memorandum. *See SIPC v. Ambassador Church Finance/Development Group, Inc.*, Civ. No. 74-471 (M.D. Tenn. January 9, 1981). They need be repeated only briefly here. On November 7, 1974, this court appointed Mr. Bryan temporary receiver for Ambassador Church Finance/Development Group (the debtor). On December 17, 1974, the court found the customers of the debtor were in need of the protections afforded by the Act and appointed Mr. Bryan trustee in charge of the debtor's liquidation. By February 1975, all the plaintiffs had filed their claims as customers under the Act. The amounts of these claims were never disputed. The plaintiffs' status as "customers" under the Act was disputed, however. *See* SIPA of 1970, § 6(c)(2)(A)(ii), 84 Stat. 1636, 1647-48 (1970). The plaintiffs objected to the trustee's rejection of their claims and filed suit. This court found that the plaintiffs were customers under the terms of the Act. *SIPC v. Ambassador Church Finance/Development Group, Inc., supra.* That judgment was affirmed on May 27, 1982. *S.E.C. v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982). In August of 1982, the trustee requested SIPC to advance funds sufficient to satisfy the plaintiffs' claims with interest. In November of 1982 and

February of 1983, the SIPC advanced sufficient funds to pay the plaintiffs' claims without interest. [1]

The plaintiffs contend that it is only equitable that they be compensated for the loss of use of the monies they were rightfully entitled to all along. The SIPC argues that the Act does not authorize it to pay interest to customers. It asserts that a liquidation pursuant to the Act is essentially a bankruptcy proceeding, *see, e.g., Exchange National Bank v. Wyatt*, 517 F.2d 453 (2d Cir. 1975); *SIPC v. Charisma Securities Co p.*, 506 F.2d 1191, 1193 (2d Cir. 1974); SIPA of 1970, § 6(c), 84 Stat. 1636, 1647 (1970); that the general rule is that interest on a claim ceases to accrue upon institution of a bankruptcy proceeding, *Nicholas v. United States*, 384 U.S. 678, 685, 86 S. Ct. 1674, 16 L. Ed. 2d 853, 860 (1966); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163, 67 S. Ct. 237, 91 L. Ed. 162, 164 (1946), and that none of the exceptions to that rule are applicable.[2] So that this matter may be put in perspective, it should be made clear that there are no assets belonging to or emanating from the insolvent

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[1] In November of 1982, SIPC advanced the following amounts:

Pine Street Baptist Church	$13,250.00
First Church of the Nazarene	15,250.00
First Church of God	10,800.00
First Missionary Baptist Church	20,000.00
Theatre Nashville, Inc.	10,800.00
West Gate Baptist Church	20,000.00

In February of 1983, SIPC advanced the following amounts:

Randall Memorial Freewill Baptist Church	$50,000.00
Fair Winds Baptist Church	14,750.00
Southmoore Baptist Church	15,115.00
Westwood Baptist Church	22,000.00
Christian Schools, Inc., d/b/a Goodpasture Christian School	8,851.00

[2] There are two well-defined exceptions to the rule against post-petition interest on claims against a bankrupt debtor. Interest is allowed where the alleged bankrupt proves solvent. It is also allowed to a secured creditor where the security is either sufficient to pay interest and principal, or where it generates sufficient income to pay interest. *In re Caudle*, 13 B.R. 29, 33 (W.D. Tenn. 1981).

broker to pay interest or satisfy the claim. The claim made here for interest is a claim against the assets of SIPC.

The Act mandates the establishment of a fund by assessment of qualified brokers. The public, as well as Congress, is interested in the preservation of the solvency of this fund so that there will be stability in the securities industry. It is always possible that enough failures could take place to tax the existence of this fund without the additional burden of payment of interest on the claims filed and allowed. Congress was no novice in the administration of funds for the stability of industry. It established the FDIC for the banking industry. After many decades of experience with the FDIC it established the SIPC. Congress had to be aware of the benefits, as well as the dangers of administering a fund to stabilize an industry. It must have known that claims would be delayed due to differences of opinion about their classifications and character and that in all likelihood litigation would ensue which might postpone their payment for many years. It is unlikely that a brokerage firm can be liquidated without hybrid relationships between the securities dealers and the public which would result in peculiar claims. Congress could have specifically provided for payment of interest out of the funds of SIPC, but did not do so.

However, the Court in the case of *First Empire Bank v. Federal Deposit Insurance Corp.*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S. Ct. 293, 58 L. Ed. 265 (1978), added a new dimension to the administration of claims under the government insurance funds. In that case the Court discussed the cases of *White v. Knox*, 111 U.S. 784, 4 S. Ct. 686, 28 L. Ed. 603 (1884); *Armstrong v. American Exchange National Bank*, 133 U.S. 433, 10 S. Ct. 450, 33 L. Ed. 747 (1890), and *Ticonic National Bank v. Sprague*, 303 U.S. 406, 58 S. Ct. 612, 82 L. Ed. 926 (1983). These cases

dealt with the allowance of interest on claims due from a receiver of an insolvent bank. After consideration, the Court held that the FDIC was required to accord equal treatment among creditors. Furthermore, because a ratable distribution was not made, the omitted creditors were permitted to recover interest from the date on which distribution would have been made had all claims been treated ratably.

If we apply the same equitable doctrine to the requirement that SIPC was required to treat claimants of like class equally, then, absent such treatment, interest should accrue. Thus, if all similar claims were paid at a certain date, then interest would accrue from that date until claims of the same class were paid. This date is June 2, 1975. Thus the claimants are entitled to statutory interest from June 2, 1975, to date. The court feels that this is an equitable solution.

The SIPC contends that even if it is liable for customer claims for cash no interest could ever accrue on customer claims for securities. In this case plaintiffs West Gate Baptist Church, Randall Memorial Free Will Baptist Church, and Westwood Baptist Church recovered claims for securities rather than cash. Like the other plaintiffs, they had delivered their bonds to the debtor so that it could sell them to the public. The debtor had informed the three plaintiffs that it had not been able to sell their bonds; thus, on the filing date of these proceedings, the three thought their accounts contained bonds rather than cash. *See* SIPA of 1970 § 6(c)(2)(B) and (f)(1), 84 Stat. 1636, 1649, 1651 (1970). Based on these facts, the SIPC concurred in the trustee's conclusion that their claims should be treated as ones for securities rather than cash.

Though somewhat confusing, the SIPC's attempt to distinguish claims for cash from those for securities appears to be based on two theories. The first is that the three

plaintiffs were only entitled to receive securities, therefore no interest can accrue on their claims. Although no explanation is provided for this conclusion, one might support it by arguing that Congress had no intention of insuring investors against market fluctuations. *See S.E.C. v. Albert & Maguire Securities Co., Inc.*, 560 F.2d 569, 572 (3d Cir. 1972). The second theory is that because the three plaintiffs received greater coverage than if their claims had been for cash it would be inequitable to allow interest on the larger recovery.

The first theory is flawed by mistakes of law and fact. The SIPC correctly observes that whenever a trustee can return securities to a customer in kind he is obligated to do so. SIPA of 1970, § 6(c)(2)(B), 84 Stat. 1636, 1649 (1970). With regard to Westgate, Westwood and Randall Memorial, the trustee obviously found it impractical to replace their securities with "securities of the same class and series of an issuer."[3] The SIPC's argument, therefore, reduces to a "but if" theory. Under the facts of this case, the trustee was obligated to compensate Westgate, Westwood and Randall Memorial with cash. They were deprived of the same thing all the other plaintiffs were — loss of use of their money. They are entitled to interest to compensate them for that loss the same as the other plaintiffs.[4]

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[3] Presumably the debtor sold the plaintiffs' securities and converted the proceeds to his benefit.

[4] Perhaps the SIPC is suggesting that the trustee was obligated to use the funds advanced to him to purchase securities which would then have been delivered to the plaintiffs in satisfaction of their claims. If so, the court finds such a proposition wholly unconvincing. First the Act specifically provides that net equities for securities may be paid in cash. SIPA of 1970, § 6(f), 84 Stat. 1636, 1651 (1970). Second, why would Congress provide that securities shall be distributed "ratably," *id.*, unless it contemplated such a distribution would be made from an exhaustible supply such as the single and separate fund? *See also, id.* at § 6(c)(C), 84 Stat. 1686, 1649 (1970) (providing for proration of claims for "specifically identifiable securities." Finally, such a scheme would be economically and administratively inefficient.

The difference in the amount of coverage provided for securities as distinguished from cash claims does not indicate that interest cannot accrue on claims for securities. The Act as originally proposed provided for $50,000 coverage per customer without drawing any distinction between cash or securities claims. *See* 116 Cong. Rec. 40861, 40866 (1970). Senator McIntyre thought this amount was too large and proposed a reduction in coverage to $20,000 without distinction between cash or securities claims. 116 Cong. Rec. 40861, 40872. Senator Bennett proposed a compromise which provided $20,000 coverage for cash, the same amount the FDIC then provided on deposits in its covered institutions, and $50,000 coverage on securities. *Id.* In the ensuing debate, Senators Javits and Percy strenuously argued that $50,000 was a reasonable amount of coverage for investors. *Id.* at 40873-77. Thus, the difference in the amount of coverage provided for securities and cash claims represents the considered judgment of Congress as to what was reasonable. It in no way suggests that it would be inequitable to award interest on a securities claim.

The SIPC asserts if it is required to pay interest its rights of subrogation entitle it to reimbursement for those payments from the debtor's estate. The SIPC is subrogated to all customer claims paid with advances from its fund. SIPA of 1970, § 6(f), 84 Stat. 1636, 1651 (1970). In most cases, customers' claims arise from the debtor's defalcations. In this case, however, the customers' claims arose from the SIPC's actions, not the debtor's. It was the SIPC that made the decision to challenge the plaintiffs' status as customers. Granted, the trustee concurred in that decision, but the proof at trial demonstrated that it would not have made a difference

had he not done so. The SIPC alone controlled its fund. Its actions caused the plaintiffs' loss; thus, its right of subrogation is against itself, not the trustee.

An appropriate order will be entered.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 74-471 No. 3-83-0541
PINE STREET BAPTIST CHURCH *et al*	)	
v.	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

ORDER

In accordance with the memorandum contemporaneously filed, judgment is entered in favor of the plaintiffs. The plaintiffs shall, within ten (10) days, submit to the

court the calculations of the interest due them as set forth in the memorandum.

This case is closed.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
v.	)	No. 74-471
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 3-83-0541
PINE STREET BAPTIST CHURCH, *et al.*	)	
v.	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

MEMORANDUM

This memorandum briefly explains the formula used to compute the awards made in the accompanying order.

On November 5, 1984, judgment was entered granting the plaintiffs interest on their judgments from June 2, 1975 at the statutory rate. *See* 28 U.S.C. § 1961. Prior to April 1, 1979, the maximum allowable statutory rate of prejudgment interest was six percent. Tenn. Code Ann. § 47-14-104 (1978 Supp.). Therefore, from June of 1975 to March 31, 1979, interest has been calculated at the rate of six percent per annum compounded annually. From April 1, 1979, to the date of judgment, interest has been calculated at the rate of ten percent per annum compounded annually. Tenn. Code Ann. § 47-14-123 (1984). Post-judgment interest has been computed at the rate of ten percent per annum compounded annually. Tenn. Code Ann. § 47-14-121 (1984).[1]

The defendant objects to any compounding of interest. The statutes that authorize the payment of interest do not specify whether interest is to be compounded or not. In this court's opinion, interest must be compounded if the plaintiffs are to be fully compensated for the loss of use of their money. The defendant also requests that the court award less than the maximum allowable rate of interest because it litigated the plaintiffs' claims in good faith. As was noted in the court's prior memorandum, the defendants' good faith had no bearing on the court's decision to award the plaintiffs interest. That decision was made not to penalize the defendant, but to compensate the plaintiffs for the loss of use of money that was rightfully theirs. *See Schoen v. J. C. Bradford & Co.*, 667 S.W.2d 97, 101-102 (Tenn. Ct. App. 1984).

An appropriate order shall be entered.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

[1] The Appendix attached to this memorandum contains a detailed illustration of the calculations used to arrive at the judgments.

APPENDIX

ILLUSTRATION OF CALCULATIONS USED TO ARRIVE AT JUDGMENTS

PINE STREET BAPTIST CHURCH

Principal: $13,250

Interest computed at 6% compounded annually from June 1, 1975, to March 31, 1979. Interest computed at 10% compounded annually from April 1, 1979 to present.

6/1/75 — 5/31/76	($13,250 x 6%)	=	$795.00
6/1/76 — 5/31/77	($14,045 x 6%)	=	842.70
6/1/77 — 5/31/78	($14,887.70 x 6%)	=	893.26
6/1/78 — 3/31/79	[($15,780.96 x 6%) x 5/6]	=	789.05
4/1/79 — 3/31/80	($16,570.01 x 10%)	=	1,657.00
4/1/80 — 3/31/81	($18,227.01 x 10%)	=	1,822.70
4/1/81 — 3/31/82	($20,049.71 x 10%)	=	2,004.97
4/1/82 — 10/31/82	[($22,054.68 x 10%) x 7/12]	=	1,286.52
Principal of $13,250 paid 11/82 leaving an unpaid balance of $23,341.20 − $13,250.00 = $10,091.20			
11/1/82 — 10/31/83	($10,091.20 x 10%)	=	$1,009.12
11/1/83 — 10/31/84	($11,100.32 x 10%)	=	1,110.03
11/1/84 — 1/31/85	[($12,210.35 x 10%) x 1/4]	=	305.26
Judgment due Pine Street as of 1/31/85:			12,515.61

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
v.	)	No. 74-471
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 3-83-0541
PINE STREET BAPTIST CHURCH, *et al.*	)	
v.	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

ORDER

In accordance with the accompanying memorandum and the memorandum and order entered on November 5, 1984, in the above-styled case, it is ordered that the Secur-

ities Investor Protection Corporation pay the following amounts to the parties specified on January 31, 1985:

Pine Street Baptist Church	$12,515.61
First Church of the Nazarene	11,375.80
First Church of God	10,201.40
Theatre Nashville, Inc.	10,201.40
First Missionary Baptist Church	18,891.50
West Gate Baptist Church	48,136.24
Randall Memorial Freewill Baptist Church	48,594.40
Southmoor Baptist Church	14,690.07
Fair Winds Baptist Church	14,335.35
Westwood Baptist Church	35,107.25
Christian Schools, Inc.	8,602.17

It is so ORDERED.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

APPENDIX D

STATUTES INVOLVED

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

15 U.S.C. § 78ccc. Securities Investor Protection Corporation

(b) Powers

In addition to the powers granted to SIPC elsewhere in this chapter, SIPC shall have the power —

> (1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any State, Federal, or other court; . . . .

15 U.S.C. § 78fff-3. SIPC advances

(a) Advances for customers' claims

In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys, not to exceed $500,000 for each customer, as may be required to pay or

otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that —

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;

(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

15 U.S.C. § 78ggg. SEC functions

(b) Enforcement of actions

In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

15 U.S.C. § 78kkk. Miscellaneous provisions

(c) Liability of SIPC and Directors, officers, or employees

Neither SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter.

15 U.S.C. § 78111. Definitions

(11) Net equity

The term "net equity" means the dollar amount of the account or accounts of a customer, to be determined by —

(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus

(B) any indebtedness of such customer to the debtor on the filing date; plus

(C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section 78fff-2(a) of this title).

In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.